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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 33

LOCAL UNION No. 25 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and the following, as individuals and representatives of said Local Union No. 25 of Boston, Massachusetts; EDWARD F. JENKINS, MICHAEL J. NORTON and WILLIAM J. MCCARTHY,

Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

PETITION FOR REHEARING

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HERBERT BURSTEIN.

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Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

PETITION FOR REHEARING

The New York, New Haven & Hartford Railroad Company, Respondent, respectfully petitions, pursuant to Rule 58 of the Revised Rules of the Supreme Court of the United States, for a rehearing of the judgment of the Supreme Court entered herein on January 9th, 1956 which reverses the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts and respectfully requests reargument herein.

In support of the petition, respondent respectfully shows and alleges:

I

The judgment of reversal and the opinion disclose an error of fact, a conclusion of law which is not supported by the legislative history of the Labor Management Relations Act, as amended (29 U. S. C. 141 *et seq.*) (hereinafter sometimes called the "Act"), and a failure to pass upon a fundamental question of law which must be the touchstone of the decision in this case.

Respondent respectfully states that the limitation of argument and the vague and indefinite character of the question before the Court did not accord Respondent a fair opportunity for a full and complete exposition of the issue upon which this Honorable Court decided the appeal.

II

The opinion of this Court incorrectly suggests a contention by Respondent that a charge of an unfair labor practice cannot be filed by a railroad. On the contrary, Respondent acknowledged that a railroad may file a charge (Respondent's Brief, p. 18). However, the thrust of Respondent's argument was, first, that a railroad is not a "person" within the meaning of Section 8(b)(4) of the Act (29 U. S. C. 158(b)(4)) so that, as a matter of law, there was not and could not be a secondary boycott as defined in Section 8(b)(4)(A) of the Act and, second, that decisions by the National Labor Relations Board (hereinafter called the "Board") indicated the futility of filing a charge.

The mere fact that the Board's Rules and Regulations permit the filing of a charge by any "person" does not, *a fortiori*, establish that a railroad is a "person" within the meaning of Section 8(b)(4) of the Act or that the right to file a charge restricts the charging party to the remedies under the Act. Even if the Board's Rules are a proper implementation of the Act, the cardinal question is whether a railroad is a "person" within the meaning of Section 8(b)(4)(A), and whether, in the circumstances of this case,

there was a secondary boycott. This question is not one for primary determination by the Board. It is, exclusively, a question of law which depends for its resolution upon the meaning of the word "person," as employed in the Act, rather than in the Board's rules.

Of course, this Court did conclude that railroads "are not excluded from the Act's definition of a 'person'" and consequently railroads are "entitled to Board protection from the kind of unfair labor practice proscribed by Section 8(b)(4)(A)." This conclusion, Respondent respectfully submits, is supported neither by legislative history nor by the canons of statutory construction.

The process of construing the word "person," when employed in regulatory statutes, is not mechanical. The sense in which Congress employs the word can be determined only after an analysis of the broad purposes and objectives of the statute and its legislative history (*United States of America* v. *Public Utilities Commission of the State of California*, 345 U. S. 295; *Helvering* v. *Hutchings*, 312 U. S. 393; *United States* v. *Alpers*, 338 U. S. 680).

A review of the legislative history of the Wagner Act and the Labor Management Relations Act show, first, that Congress did not intend to include railroads within the meaning of the term "person" and, second, that since the Act was designed to establish a scheme of correlative rights and duties, the term "person" was limited to those employers and labor organizations subject to the provisions of the Act.

Briefly, the definition of "person" appeared in the first draft of the Wagner Act introduced in the Senate. 1 Legislative History, National Labor Relations Act, p. 1071. Section 2(1) of that Act omitted reference to labor organizations. The second Senate print of S. 2926, which was introduced in the Senate, incorporated in Section 2(1) the words "labor organizations" as part of the definition of "person". 1 Legislative History, National Labor Relations Act, p. 1085.

On February 15, 1935 Senator Wagner introduced S. 1958 as a substitute for S. 2926. Section 2(1) of that bill omitted labor organizations from the definition of "person". Senator Wagner also submitted an explanation of S. 1958. Included in Senator Wagner's statement was a memorandum comparing S. 1958 with S. 2926. It was there pointed out that the definition in S. 1958, which omitted labor organizations entirely, pluralized "all terms, to take account of multiple parties *defendant* without the necessity of repetition throughout the act" (italics supplied). 1 Legislative History, National Labor Relations Act, pp. 1296, 1342.

Reference to the word "defendant" is significant because it shows that the term "person" was intended to apply only to those who may be charged with an unfair labor practice.

The omission of labor organizations from the definition of "person" in the Wagner Act is consistent with this construction, since there were no union unfair labor practices under that Act and a labor organization could not be a defendant in a Section 10 proceeding. However, when the Wagner Act was amended and Congress legislated union unfair labor practices, the definition of "person" was amended to expressly include labor organizations and to thereby remove any doubt that labor organizations could be defendants in an unfair labor practice proceeding. 1 Legislative History of the Labor Management Relations Act, p. 535.

Clearly, a railroad can never be a defendant under the Act. It must be conceded that if a railroad refused to bargain with its employees or their representatives, it could not be guilty of an unfair labor practice under Section 8(a). If a union of railroad employees induced a strike which created a secondary boycott, the activity would not be embraced within Section 8(b)(4). So, too, if railroad employees are induced to strike, and the strike generated a secondary boycott, there can be no violation of

Section 8(b)(4). It appears, therefore, that the opinion of the Court may be rationalized only by assuming that in the remote instance where a railroad is a victim of a secondary boycott, it is a "person" under the Act for that limited purpose only. Certainly, such a construction of the term "person" does not accord with the principles enunciated by this Court in *United States* v. *Cooper Construction,* 312 U. S. 600, and other landmark cases.

If the Act is read in its entirety, it becomes evident that the word "person" could not have been intended to apply to a railroad. Section 10 of the Act employs the term "person" in various contexts which unmistakably exclude railroads.

The suggestion that a person not included within the definition of "employer" may be considered a "person" for the purposes of Section 8(b)(4) was rejected by the Board in *Al J. Schneider,* 87 NLRB 99, where the Board held:

> "The findings and policies of the Act demonstrate beyond a shadow of a doubt that Congress legislated a scheme of correlative rights and duties attaching to employees, employers and labor organizations from which government as 'employer' was intentionally excluded. Indeed, the entire thrust of the Act is upon the right of employees in private industry to organize and bargain collectively with employers 'organized in corporate or other forms of ownership association.'"

It is true that the *Schneider* case involved a governmental agency. It is also true that the Board in that case acknowledged that a governmental agency is not foreclosed from filing a charge. Nevertheless, the Board held that since a labor organization could not secure the issuance of a complaint against a governmental agency, to hold that a governmental agency is a person for the purposes of Section 8(b)(4) would frustrate the scheme and policy of the Act.

By a parity of reasoning, since there are no correlative rights between a railroad and a labor organization subject to the Act, since a labor organization could never secure the issuance of a complaint against a railroad under the Act, the term "person" should no more be extended to include railroads than to include government agencies and corporations.

Finally, it must be noted that the Court's construction of the word "person" does not harmonize the Railway Labor Act and the Labor-Management Relations Act. If a charge were filed by Respondent and the Board determined that petitioners' activities were protected, then it would become a rule of law that non-railroad employees may interfere with and prevent the operation of a railroad while railroad employees, who engaged in the identical activities, are subject to the inhibitions of the Railway Labor Act. Certainly, Congress did not intend to create classes of employees with distinctions in rights.

It is manifest that the basic design of Congress, as disclosed in railroad legislation, was not to subject railroads to the restrictions, limitations and remedies of the Labor Management Relations Act. Indeed if the Congressional purpose were otherwise, the definition of "employer" would not have been carefully re-written to specifically exclude railroads. Surely, when Congress amended the definition of "person", it could have included railroads by the addition of a simple phrase. Congress did not do so because it never intended to restrict railroads to administrative processes other than those enacted in the Railway Labor Act.

For the reasons herein stated, Respondent respectfully submits that a railroad is not a "person" within the meaning of Section 8(b)(4) and therefore there was not the type of activity proscribed by the Act and over which the Board had jurisdiction.

In its opinion, the Court points out that the parties agree and the Massachusetts Court found that there was no labor dispute between the Respondent and its employees and that the Petitioner "was in no way concerned with the respondent's labor policy." The Court then states that there was no claim "that the union interfered in any manner whatsoever with the railroad employees." This finding is not supported by the record. Thus, in their Petition for a Writ of Certiorari, the Petitioners stated that when trailers are driven on to the flat cars by employees of New England Transportation Company, they are secured to the flat cars by employees of the railroad (Petition, p. 4). In Petitioners' brief, the identical fact is again asserted (Petitioners' brief, p. 4). Confirmation of this fact is also found in the record (R. pp. 50, 68-69, 74).

Clearly, with respect to trailers which were not permitted to enter the Respondent's yard, employees of the Railroad were not permitted to perform their duties of fastening the trailers to the flat cars and, as a consequence, were rendered idle by reason of the Union's activities.

As the Massachusetts Supreme Judicial Court pointed out, the Petitioners were attempting "to eliminate or restrict competition by the railroad" (R. 311). There is no greater impact upon, and interference with, workers than an actual or a threatened loss of employment opportunities.

Concededly, there was no active inducement of railroad employees to cease work, but the inevitable effect of the Union's activity was to prevent railroad employees from working.

There was no opportunity for argument of this aspect of the case nor did the question before this Court suggest that this problem be discussed. To be sure, this Court is under no obligation to instruct counsel as to matters which are embraced within the framework of an appeal. The fact is, however, that the question presented nowhere indicated that this was a vital question to be resolved.

IV

The grave economic consequences which are certain to follow the decision of this Court are significant not only to railroads and motor carriers, but to the national welfare.

Briefly, in 1953 only six railroads provided "piggy back" service. In 1956, 34 railroads instituted this service. Thus, in 1955, the Southern Pacific Railroad handled 37,736 trailers; the New Haven Railroad handled 30,000 trailers. Involved in the "piggy back" service are millions of dollars of investment and operation revenues, and the livelihood of thousands of railroad and motor carrier employees. In addition, many thousands of persons are employed in the manufacture of special railroad cars and trailers.

"Piggy back" operation has created a revolution in rail and motor transportation. Practically every class and kind of commodity is transported by way of "piggy back" service.[1]

A disruption of this vital service and economic catastrophe for tens of thousands of employers and employees engaged in this unique and specialized service is now threatened.

Respondent recognizes, of course, that this Honorable Court cannot fabricate legal principles to meet economic exigencies nor does Respondent seek such relief. Respondent contends only that the broad and basic economic and legal issues implicit in this case reasonably require further consideration by this Court and a more complete opportunity for argument and exposition than was accorded.

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[1] 139 Railway Age, 36-55 (December, 1955); IX Railway Progress, 12-17 (January, 1956); 10 Modern Railroads, 61-72, (December, 1955).

V

For all of the reasons herein set forth, Respondent respectfully submits that a rehearing should be granted.

Respectfully submitted,

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New York City,

HERBERT BURSTEIN,
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New York City,

Attorneys for Respondent.

HERBERT BURSTEIN,
of Counsel.

Certificate

I hereby certify that this petition is presented in good faith and not for delay and I further certify that copies of this petition have been served on opposing counsel by depositing in the U. S. mail on this, the 2nd day of February, 1956.

HERBERT BURSTEIN.